Supreme Court, U.S.
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No. 97-988

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

BARNEY QUILTER, *et al.*,
Appellants,
v.
GEORGE V. VOINOVICH,
Governor of the State of Ohio, *et al.*,
Appellees.

Appeal from the United States District Court for the Northern District of Ohio

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BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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TABLE OF CONTENTS

	Page
I. THE COURT SHOULD DENY APPELLEES' MOTION TO AFFIRM BECAUSE THE ISSUES PRESENTED TO AND NECESSARILY DECIDED BY THE DISTRICT COURT INVOLVE IMPORTANT AND UNRESOLVED QUESTIONS OF CONSTITUTIONAL LAW, NOT QUESTIONS OF FACT	2
II. RATHER THAN SUMMARILY AFFIRM THE DISTRICT COURT'S DECISION ON ISSUES OF STANDING, THIS COURT SHOULD ADDRESS APPELLANTS' STANDING ARGUMENTS AND CLARIFY THE RELATIONSHIP OF INJURY TO THE BRIGHT-LINE RULE ANNOUNCED IN *UNITED STATES v. HAYS*	5
III. THE LEGAL AND FACTUAL ASSERTIONS IN APPELLEES' MOTION TO AFFIRM ARE UNRELIABLE	6
CONCLUSION	8

TABLE OF AUTHORITIES

CASES	Page
Bush v. Vera, 517 U.S. 952, 116 S. Ct. 1941 (1996)	1-2, 3
In re Voinovich, 511 U.S. 1126, 114 S. Ct. 2156 (1994)	1
Mandel v. Bradley, 432 U.S. 173, 97 S. Ct. 2238 (1977)	5
Quilter v. Voinovich, 912 F. Supp. 1006 (N.D. Ohio 1995)	4, 8
Quilter v. Voinovich, 981 F. Supp. 1032 (N.D. Ohio 1997)	3, 7
Shaw v. Hunt, 517 U.S. 899, 116 S. Ct. 1894 (1996)	2, 3
Shaw v. Reno, 509 U.S. 630, 113 S. Ct. 2816 (1993)	7
United States v. Hays, 515 U.S. 737, 115 S. Ct. 2431 (1995)	5
Voinovich v. Ferguson, 63 Ohio St. 3d 198, 586 N.E.2d 1020 (1992)	7
Voinovich v. Quilter, 507 U.S. 146, 113 S. Ct. 1149 (1993)	1
Voinovich v. Quilter, —— U.S. ——, 116 S. Ct. 2542 (1996)	2
STATUTES	
42 U.S.C. § 1973	6

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BRIEF IN OPPOSITION TO MOTION TO AFFIRM

Contrary to Appellees' assertion at page 1 of their Motion to Affirm, this is actually the *fourth* time that this litigation has been before this Court. However, on each prior occasion it was the Appellees, not Appellants, who petitioned this Court to review and reverse the decisions rendered below.[1] Only now, after a newly constituted

[1] *First*, on March 11, March 25, April 1 and May 26, 1992, Appellees noticed their appeals of various decisions rendered by the District Court below. This Court delivered its opinion on those appeals on March 2, 1993. *Voinovich v. Quilter*, 507 U.S. 146, 113 S. Ct. 1149 (1993). *Second*, on April 20, 1994, Appellees unsuccessfully sought a writ of mandamus in response to the District Court's order granting Appellants' motion for leave to file a second amended complaint. *In re Voinovich*, 511 U.S. 1126, 114 S. Ct. 2156 (1994). *Third*, on August 17, 1995, Appellees noticed their appeal from the District Court's entry of judgment in favor of the Appellants. This Court subsequently remanded this action for reconsideration in light of its opinions issued in *Bush v. Vera*, 517 U.S. 952, 116

panel in the District Court (including one Judge who has never heard any evidence in this case) voted 2-1 to reverse the District Court's prior decision in Appellants' favor, do Appellees seek summary affirmance and cavalierly assert that this case "presents no issue worthy of plenary review." Motion to Affirm, p. 1.

The unsettled legal issues before the Court are no less worthy of its attention now than before, and are even more worthy due to the District Court's misguided creation and application of an erroneous legal standard in an important area of constitutional law.[2] The Appellees' Motion to Affirm therefore should be denied.

I. THE COURT SHOULD DENY APPELLEES' MOTION TO AFFIRM BECAUSE THE ISSUES PRESENTED TO AND NECESSARILY DECIDED BY THE DISTRICT COURT INVOLVE IMPORTANT AND UNRESOLVED QUESTIONS OF CONSTITUTIONAL LAW, NOT QUESTIONS OF FACT

Appellees' arguments are noteworthy for their nearly exclusive emphasis on Appellees' view of the underlying facts of this litigation. Given the current procedural posture, this emphasis is misplaced.

It is undisputed that, acting upon remand from this Court,[3] the District Court below did nothing more than

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S. Ct. 1941 (1996) and *Shaw v. Hunt*, 517 U.S. 899, 116 S. Ct. 1894 (1996) (*"Shaw II"*). *Voinovich v. Quilter*, —— U.S. ——, 116 S. Ct. 2542 (1996). *Fourth*, and finally, this appeal, the first by Appellants, was noticed to obtain review of the District Court's reversal of its prior decision, and the entry of judgment in Appellees' favor, on remand.

[2] Jurisdictional Statement, pp. 9-23. Appellees neither attempted to defend *nor even mentioned* the new legal standard crafted by the District Court, but instead limited their argument to a blanket assertion that the District Court "did not commit any error." Motion to Affirm, p. 12 (emphasis omitted). This surprising silence can only be interpreted as an implicit acknowledgment that the District Court's newly-created legal standard is not defensible.

[3] *Voinovich v. Quilter*, —— U.S. ——, 116 S. Ct. 2542 (1996).

reconsider its earlier decision (rendered in favor of Appellants) in view of this Court's decisions in *Bush v. Vera*, 517 U.S. 952, 116 S. Ct. 1941 (1996) and *Shaw v. Hunt*, 517 U.S. 899, 116 S. Ct. 1894 (1996) ("*Shaw II*"). The District Court considered no new evidence and limited its analysis to the legal questions presented:

> "Because we focus on application of the legal analysis outlined by the Supreme Court in recent cases, we will not revisit the facts and procedural history of this case in detail. . . . On remand, we have limited our consideration to the effect of *Bush* and *Shaw II* on our previous analysis and holding. We have not considered any new evidence; we therefore readopt our previous factual findings, as outlined in the vacated opinion, to the extent that they are findings of fact and not conclusions of law . . . and to the extent that they are relevant to the threshold analysis."

Quilter v. Voinovich, 981 F. Supp. 1032, 1035 (N.D. Ohio 1997), App. 1a at 1a-3a.

Moreover, the opinion below was authored by newly-appointed Circuit Judge Karen Nelson Moore, who was assigned to the panel only *after* the last evidentiary hearing in this case. As a result, Judge Moore heard no evidence in the case and relied instead upon the District Court's prior findings of fact.

Since the District Court reached two starkly different conclusions based upon the same set of facts, its change of position can be explained only in terms of the legal implications of this Court's decisions in *Bush* and *Shaw II*. Accordingly, in bringing this appeal, Appellants properly focused their arguments upon the District Court's interpretation and application of these decisions, not upon the facts. Jurisdictional Statement, pp. 17-23.

Appellees' misplaced emphasis on the facts of this case, and their conspicuous failure to address the District Court's newly-created legal standard, reveals the fatal flaw in their position: rather than argue that the District Court

should be summarily affirmed because it correctly decided the legal issues before it, Appellees insist that regardless of the District Court's (erroneous) interpretation of the law, this Court should summarily affirm its decision because Appellees believe they should win on the facts anyway.

This argument is unpersuasive not only because the facts were not contested in the proceedings on remand, but also because there is no reason to believe tha he facts necessarily dictate any result in Appellees' or when the proper legal standard is applied. Indeed, prior to this Court's decisions in *Shaw II* and *Bush*, it was the *Appellants* who prevailed on the facts [4]—and those facts have not changed since the last decision of the District Court was rendered before remand. As demonstrated by the District Court's contrary decision reached upon the *same set of facts after remand*, the dispositive issues before the Court go to the legal standards that should be applied to the facts, not to the facts themselves. If the District Court erred in applying its newly-created legal standard—and, remarkably, Appellees do not contest Appellants' arguments in this regard—then there is no guarantee that application of the correct legal standard will favor Appellees.

Thus, Appellees are *not* seeking a summary affirmance of the District Court's application of existing law to the facts of this case—the precise issue presented to and necessarily decided by that Court. Instead, they ask this Court to apply Appellees' generalized assessment of *Bush* and *Shaw II* to Appellees' view of the facts of this case, without briefing, oral argument or a written opinion, and to conclude that if the District Court had applied the correct legal standard (whatever that may be), then the Appellees would have prevailed.

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[4] *Quilter v. Voinovich*, 912 F. Supp. 1006 (N.D. Ohio 1995), App. 63a.

This Court should decline Appellees' invitation to determine and apply important and uncertain issues of constitutional law without briefing, oral argument, or an opinion explaining its decision. Given that both sides have prevailed at some point in the District Court based upon the same set of facts, it is apparent that it is this Court's opinions in *Bush* and *Shaw II*, rather than Appellees' revisionist rendition of the facts of this case, that should be dispositive. Accordingly, notwithstanding the limited precedent that would be set by a summary affirmance,[5] such an affirmance reasonably might be interpreted as concluding that the District Court correctly created and applied a new legal standard, because the "precise issue[] presented and necessarily decided", *Mandel v. Bradley*, 432 U.S. 173, 176, 97 S. Ct. 2238, 2240 (1977), was the effect of this Court's decisions in *Bush* and *Shaw II*. The likelihood that a summary affirmance upon the facts will be misinterpreted in this manner by apportioning bodies, courts and commentators, warrants the denial of Appellees' Motion to Affirm.

II. RATHER THAN SUMMARILY AFFIRM THE DISTRICT COURT'S DECISION ON ISSUES OF STANDING, THIS COURT SHOULD ADDRESS APPELLANTS' STANDING ARGUMENTS AND CLARIFY THE RELATIONSHIP OF INJURY TO THE BRIGHT-LINE RULE ANNOUNCED IN *UNITED STATES v. HAYS*

Contrary to the Appellees' assertions,[6] Appellants have not attempted to avoid this Court's bright-line standing rule announced in *United States v. Hays*, 515 U.S. 737, 745, 115 S. Ct. 2431, 2436 (1995). Jurisdictional State-

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[5] "Because a summary affirmance is an affirmance of the judgment only, the rationale of the affirmance may not be gleaned solely from the opinion below." *Mandel v. Bradley*, 432 U.S. 173, 176, 97 S. Ct. 2238, 2240 (1977). Summary affirmances do, however, "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided." *Id.*

[6] Motion to Affirm, p. 26.

ment p. 25. Instead, after acknowledging the existence of the bright-line standing rule, Appellants offered specific reasons why this Court should reconsider that rule and, in particular, why it should clarify the relationship between the bright-line rule and the constitutional injury that underlies standing in this area. *Id.* at 24-25.

Given the concern expressed by a number of commentators who have pointed out conceptual difficulties with the existing bright-line standing rule, *id.* at 25, reconsideration of this rule will provide this Court with an opportunity to clarify the theory behind it, and thereby to provide a conceptual framework for lower courts to apply when addressing new issues in the area of standing. Thus, the Court should decline Appellees' request for summary affirmance of the District Court's ruling in regard to issues of standing.

III. THE LEGAL AND FACTUAL ASSERTIONS IN APPELLEES' MOTION TO AFFIRM ARE UNRELIABLE

In the course of disposing of Appellees' Motion to Affirm, this Court should be aware that certain of the factual and legal statements in that Motion are inaccurate. The five items addressed below do not constitute a comprehensive listing of such errors, but they are indicative of the unreliable character of the Motion to Affirm.

First, Appellees claim that Appellants have "falsely asserted" that their original complaint alleged " 'that the Board's conscious use of race in redistricting violated the Voting Rights Act . . ., and the Fourteenth and Fifteenth Amendments to the United States Constitution.' " Motion to Affirm, p. 3 n.3 (quoting Jurisdictional Statement, p. 4). In fact, Appellants' original complaint did plead violations of the Voting Rights Act, 42 U.S.C. § 1973, and the Fourteenth and Fifteenth Amendments of the United States Constitution, and it specifically alleged: "Under the pretense of complying with the Voting Rights Act, the Defendants drew legislative boundary lines *on a race-conscious basis* . . . ." D.1, ¶ 32 (emphasis added).

Thus, Appellants have objected to the Appellees' conscious use of race throughout this litigation, even though they did not amend their complaint to assert a *Shaw* claim until after that kind of claim was first articulated in this Court's decision in *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816 (1993).

Second, in regard to Appellees' insistence that Tilling's notes are irrelevant because his model plan was never adopted, Motion to Affirm, pp. 7-8, 18-19, the District Court below adopted findings of fact to the contrary.[7]

Third, in regard to Appellees' suggestion that the District Court issued its opinion on August 11, 1995 "notwithstanding Appellees' prior perfection of their appeal to this Court," Motion to Affirm, p. 9, this appeal was premature because the District Court had not yet entered final judgment. Jurisdictional Statement, p. 6. Thus, that appeal had not been properly "perfected."

Fourth, in regard to Appellees' argument that a decision issued by the Ohio Supreme Court conclusively proves that the challenged redistricting plan comports with the requirements of the Ohio Constitution, Motion to Affirm, pp. 4-5, 16 n.15, that Court's short *per curiam* opinion addressed only Senate District 32, which is not one of the districts challenged in this litigation. *Voinovich v. Ferguson*, 63 Ohio St. 3d 198, 200, 586 N.E.2d 1020, 1021 (1992). Indeed, the District Court expressly held that this Ohio Supreme Court opinion "neither precludes this court's consideration of the defendants' attention to traditional districting principles with regard to HD 31, HD 39, HD 44, and HD 49, nor mandates a particular finding by this court." *Quilter*, 981 F. Supp. at 1047, App. 1a at 29a.

Finally, in regard to Appellees' lengthy discussion of the so-called Bennett letter, Motion to Affirm, p. 20 & n.18,

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[7] "[W]e readopt the description of Tilling's notes and the finding that they are 'probative' of the defendants' consideration of race, but we do not adopt the characterization of that consideration as 'predominant' under the now-relevant Supreme Court standards." *Quilter*, 981 F. Supp. at 1035, App. 1a at 3a.

Appellants merely noted without comment that in his dissenting opinion, Judge Nathaniel R. Jones pointed to this letter as constituting direct evidence supporting the Appellants' position. Jurisdictional Statement, p. 23 n.28. For the reasons stated earlier in this brief, Appellants have declined to argue the facts and instead have properly focused their arguments on the proper legal standard to be applied to uncontested findings of fact.

CONCLUSION

For the reasons set forth above and in Appellants' Jurisdictional Statement, this Court should either:

(1) summarily reverse the judgment below and remand for entry of judgment in Appellants' favor in accordance with the District Court's prior opinion in *Quilter v. Voinovich*, 912 F. Supp. 1006 (N.D. Ohio 1995), App. 63a; or

(2) note probable jurisdiction and reverse the decision of the District Court.

Respectfully submitted,

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